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Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by Germany under article 29, paragraph 1, of the Convention

Addendum

Replies of Germany to the list of issues*

[7 February 2014]

Introduction

1. On 25 March 2013, the Government of the Federal Republic of Germany submitted its State party report in accordance with article 29 of the International Convention for the Protection of all Persons from Enforced Disappearance (hereinafter "the Convention"). The report covers the period starting from the entry into force of the Convention until 19 December 2012.

2. In a letter dated 15 November 2013, the Office of the United Nations High Commissioner for Human Rights requested the Government of the Federal Republic of Germany to respond to a list of issues, containing 25 paragraphs, by 7 February 2014.

3. The Government of the Federal Republic of Germany hereby submits its replies to the list of issues.

4. Looking forward with great interest to the presentation of its State party report under the Convention, the Government of the Federal Republic of Germany hopes for a constructive dialogue with the Committee on Enforced Disappearances.

* The present document is being issued without formal editing.

Paragraph 1

5. As a national human rights organization, the German Institute for Human Rights (DIMR) contributes to the protection and promotion of human rights by and within Germany. Since its founding, the Institute has repeatedly researched and taken a public stance on topics such as abductions by secret services, so-called "rendition flights" over Germany and the reform of the supervision of intelligence services. In 2008, DIMR published a contribution on the Convention, in which it presented, inter alia, recommendations to policymakers. In April 2012, moreover, the Institute acted as one of the hosts of the Conference on Enforced Disappearance; this conference, along with its follow-up podium discussion, was attended by members of the Committee on Enforced Disappearances, representatives of civil society, academia and the judiciary, as well as the Commissioner of the Federal Government for Human Rights Issues. One of the topics of the event was the legal and factual relevance of the Convention in Germany today and, more particularly, whether there is a need to introduce new criminal legislation.

6. The competence of the Institute does not include the consideration of individual complaints. Germany has an extensive system of legal protection and complaints mechanisms at the Federal and Land levels. It is therefore not considered necessary to expand the competences of the Institute in this regard.

Paragraph 2

7. The prohibition of enforced disappearance is enshrined in the German constitution. The relevant constitutional safeguards have been set out in paragraph 7 of the report. Article 104 of the Basic Law expressly guarantees that a person's freedom may only be restricted pursuant to and in compliance with the procedures described by a formal law. This guarantee could – theoretically – only be abrogated or restricted by amendment of the Basic Law. Such amendment may only be brought about by a law expressly modifying or supplementing the Basic Law's text (article 79, paragraph 1, of the Basic Law (GG)) and only if supported by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat (article 79, paragraph 2, of the Basic Law (GG)).

8. Besides the extension of the period of detention (paragraph 15 of the report) there is no other possibility of derogating from any right and/or procedural safeguards provided for in the Basic Law that might be relevant in connection with the prevention of enforced disappearances.

Paragraph 3

9. If any "deprivation of liberty" within the meaning of article 2 of the Convention is followed by a refusal to acknowledge said deprivation of liberty, or by concealment of the fate or whereabouts of the disappeared person, then under German criminal law this may constitute a prolongation of the offence of depriving the disappeared person of his liberty, insofar as this places said person outside the protection of the law (pursuant to the definition in article 2 of the Convention). Furthermore, the acts of refusing to acknowledge the deprivation of liberty, or of concealing it, may (additionally) fulfil the elements of the following crimes: assistance after the fact (section 257 of the Criminal Code (Strafgesetzbuch, StGB)), assistance in avoiding prosecution or punishment, also while in office (section 258/258a of the Criminal Code (StGB)), omission to effect an easy rescue (section 323c of the Criminal Code (StGB)) and perverting the course of justice (section 339 of the Criminal Code (StGB)).

10. When it comes to the question of whether to introduce legislation defining such actions as a separate (autonomous) crime, the Federal Government is still engaged in

dialogue with civil society and is examining whether and to what extent an amendment of German criminal law may be called for.

11. In September of 2012, the Federal Government held discussions with representatives of the civil society (including the German Institute for Human Rights and Amnesty International) as to whether it is necessary to codify a new criminal offence. The arguments put forth in this context are being given very serious consideration by the Federal Government. The same applies to the statements of position that Amnesty International and the European Centre for Constitutional and Human Rights presented to the Committee in September 2013.

Paragraph 4

12. Military superiors are subject to the stipulations set out in sections 30 et seqq. of the Military Criminal Code (Wehrstrafgesetzbuch, WStG), particularly sections 33, 34, 40 and 41. Pursuant to section 33 of the Military Criminal Code (WStG), incitement to commit an unlawful act is a crime; pursuant to section 34 of the Military Criminal Code (WStG), this is a crime even if the attempted incitement was ultimately unsuccessful. Failure to cooperate in criminal proceedings is punishable under section 40 of the Military Criminal Code (WStG), while negligent administrative supervision is sanctioned by section 41 of the Military Criminal Code (WStG).

13. A civilian superior who allows a subordinate to commit an unlawful act, or who incites him to commit such an act, will be liable to punishment under law primarily either for committing the offence by virtue of omission (section 13 of the Criminal Code (StGB)) or pursuant to section 357 (1) of the Criminal Code (StGB). The incitement of a subordinate to commit a crime, which is punishable pursuant to section 357 of the Criminal Code (StGB), may also be deemed given if the superior fails to intervene to prevent the crime. In the case of military superiors, the above-referenced provisions of the Military Criminal Code (WStG) will apply in place of the provisions of section 357 of the Criminal Code (StGB). In addition, depending on the circumstances of the case, section 323c of the Criminal Code (StGB) may be applicable.

14. If an enforced disappearance of persons does not attain the level of a crime against humanity in the context of the Code of Crimes against International Law (Völkerstrafgesetzbuch, VStGB), then the legal norms to be applied shall be the aforementioned provisions regarding the commission of a crime by omission (section 13 of the Criminal Code (StGB)), incitement of a subordinate to commit a crime (section 357 of the Criminal Code (StGB)) and – for military superiors – the Military Criminal Code (WStG). This means that the punishments provided for by criminal law will invariably apply.

Paragraph 5

15. Of the legal norms referenced in paragraph 41 of the State party report, the following apply only to civilian personnel: section 63 of the Act on Federal Civil Servants (Bundesbeamtengesetz, BBG) section 36 of the Civil Servant Status Act (Beamtenstatusgesetz, BeamtStG), section 7 (2), first sentence, of the Law on Direct Coercion in the Enforcing of Public Authority by Law Enforcement Officers of the Federal Government, Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes, UZwG), and section 97 (2), first sentence, of the Prisons Act (Strafvollzugsgesetz, StVollzG); on the other hand, section 11 of the Act on the Legal Status of Military Personnel (Soldatengesetz, SG) applies only to military personnel.

16. No cases are known that could be relevant with regard to the protection of persons from enforced disappearances.

17. Legal recourse is available to contest any disciplinary measures that may be imposed for the refusal to carry out orders to commit unlawful acts.

18. More specifically, the following norms apply to civilian employees: a disciplinary measure imposed by an administrative superior or by the highest administrative authority may be contested by filing suit before the administrative courts (Verwaltungsgerichte) (section 40 (1), section 42 (1) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO)). The administrative courts will then determine whether the disciplinary measure was legal and suited its intended purpose (section 60 (3) of the Federal Disciplinary Act (Bundesdisziplinargesetz, BDG)). If a disciplinary measure has been imposed by a ruling of an administrative court in a disciplinary case brought by the highest administrative authority, then the public official is entitled to appeal the administrative court judgment with the Higher Administrative Court (Oberverwaltungsgericht). Section 69 of the Federal Disciplinary Act (BDG) provides that, under certain preconditions, an appeal may also be filed with the Federal Administrative Court (Bundesverwaltungsgericht).

19. For the most part, the disciplinary laws of the various Länder (German Federal States) have been structured in a similar fashion.

20. Soldiers are subject to similar regulations under the Military Code of Discipline (Wehrdisziplinarordnung WDO).

Paragraph 6

21. The first determination to be made in a specific case of enforced disappearance is which element or elements of a crime come into play. If an action of the perpetrator serves to realize several elements of a crime at once ("one act violating multiple laws or the same law more than once," section 52 of the Criminal Code (StGB)), then the statutory limitation period for each element of a crime must be considered separately. Thus, the effect of the statutory limitation period will be restricted to the individual element of the crime to which it corresponds. This means that a "split limitation" situation may apply to a single case (and even to a single criminal act). Take for example a case in which the victim is deprived of his liberty and murdered in the process. Here, the relevant crime would be murder (section 211 of the Criminal Code (StGB)) and the concurrent offence of deprivation of liberty resulting in death (section 239 (4) of the Criminal Code (StGB)). Pursuant to section 78 (2) of the Criminal Code (StGB), there is no statutory limitation period for murder. Deprivation of liberty resulting in death, meanwhile, is subject to a 20-year limitation period pursuant to section 78 (3) number 2 of the Criminal Code (StGB). Thus, the perpetrator's act would remain prosecutable as murder indefinitely. On the other hand, an additional conviction for deprivation of liberty resulting in death would no longer be possible once 20 years had gone by (unless special circumstances had blocked or interrupted the running of the limitation period).

22. For purposes of the criminal court proceedings, the aggrieved party – and thus the party entitled to file a complaint in the event prosecution is withdrawn due to the matter having become statute-barred – is the person whose legal interest(s) suffered direct damage as a result of the alleged offence, assuming such offence was in fact committed (see the explanations in paragraph 156 of the State party report). The next of kin of a person killed, who are entitled to join a public prosecution pursuant to section 395 (2) number 1 of the Code of Criminal Procedure (Strafprozessordnung, StPO), also qualify as "aggrieved parties".

Paragraph 7

23. The preconditions for the applicability of German criminal law, as set forth in section 7 of the Criminal Code (StGB), are in line with the obligations arising from article 9, paragraphs 1 and 2, of the Convention. The criteria for determining that a given offence is liable to punishment at the place at which it was committed are relatively easy to meet; as a general rule, they would be fulfilled in cases of enforced disappearance:

24. In analysing the criminal law of the place at which an act was committed, a circumstance-specific approach applies. The decisive question is not whether the two legal systems being compared feature equivalent or comparable provisions of criminal law. Rather, the determining factor is whether or not the concrete act is subject to some norm of the criminal laws governing the place where the offence was committed. The applicable provision of foreign criminal law does not have to dovetail with the corresponding provision under German law, nor does it have to serve the same protective purpose.

25. Foreign provisions serving to rule out a double liability to punishment under law, procedural hindrances to prosecution, or a failure by the foreign authorities having jurisdiction over the place of the offence to actually prosecute the crime are all irrelevant. Once it has been determined that even a single element of a crime has been fulfilled, this will trigger the applicability of the entire scope of German criminal law.

26. It is true that, as a general rule, one must respect any substantive grounds that could exempt the offence from being liable to punishment at the place of its commission, such as any justifying and/or exculpatory grounds or other exemptions from penalty. However, it is generally accepted that such grounds for exemption from punishment under the laws governing at the place of the offence are irrelevant if they contradict international public policy, i.e. universally acknowledged legal principles (cf. Rulings of the Federal Court of Justice in Criminal Law Matters (Entscheidungen des Bundesgerichtshofes in Strafsachen, BGHSt) 42, 279). This is particularly the case when such exemptions constitute a grave breach of human rights that are protected under international law. Article 5 of the Convention states that the "widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law". One of the leading reference commentaries in the German legal literature states that an individual instance of enforced disappearance, being an autonomous crime under international law (along with torture, extrajudicial execution and the core crimes codified in the Rome Statute of the International Criminal Court), also carries with it the obligation of prosecution and punishment, so that the courts of the State in which the perpetrator was apprehended should disregard any material grounds for exemption from penalty under the national laws governing at the place of the offence, as well as any procedural hindrances to prosecution (vide supra, e.g. an amnesty) (cf. Munich Commentary (Münchener Kommentar) on the Criminal Code (StGB), 2nd edition, section 7, margin no. 15 et seq. with further references). On the other hand, there are as yet no known decisions by the German courts on the specific issue of enforced disappearance.

27. In the case of Mr El-Masri, the situation with regard to the extradition of suspected persons from the United States of America remains unchanged. The arrest warrants are still in force. Mr El-Masri himself has been convicted on several occasions since his return to Germany (arson, inflicting bodily harm) and has served corresponding prison terms. He was released from prison in 2013. The European Court of Human Rights has found that the former Yugoslav Republic of Macedonia had violated Mr El-Masri's rights under the European Convention on Human Rights by handing him over to agents of the United States and failing to investigate (judgment of 13 December 2012, case number 39630/09). He has been awarded € 60,000 in damages.

28. The Federal Republic of Germany is entitled to refuse the extradition of certain groups of persons on the grounds of immunity. In principle, the following persons in Germany enjoy such immunity (and the resulting protection from extradition): members of

the German Bundestag (Article 46 of the Basic Law (Grundgesetz, GG)); delegates of the parliaments of the various Federal Länder (section 152a of the Code of Criminal Procedure (StPO) in conjunction with section 77 (2) of the Act on International Cooperation in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, IRG)); members of the European Parliament (Article 9 of the Protocol (number 7) to the Lisbon Treaty on the Privileges and Immunities of the European Union).

29. Pursuant to section 18 of the Courts Constitution Act (Gerichtsverfassungsgesetz, GVG), in conjunction with the stipulations of the Vienna Convention on Diplomatic Relations of 18 April 1961, the members of diplomatic missions, their family members and their private domestic employees also enjoy immunity. Inasmuch, they enjoy immunity from German jurisdiction and protection against extradition.

30. Concomitantly, section 19 of the Courts Constitution Act (GVG) grants immunity from German jurisdiction to members of consular missions, including honorary consular officers, in accordance with the provisions of the Vienna Convention on Consular Relations of 24 April 1963. Under section 20 (1) of the Courts Constitution Act (GVG), the representatives of foreign countries and the persons accompanying them, insofar as their presence on the territory of the Federal Republic of Germany is pursuant to official invitation, are also immune from German jurisdiction and thus protected against extradition.

Paragraph 8

31. Pursuant to section 119 (4) Nr.19 b) of the Code of Criminal Procedure (StPO), a prisoner in remand detention is entitled to communicate with the consular representatives of his home country, insofar as the court does not stipulate otherwise. Thus, free and non-monitored communication is the general rule.

32. A restriction of free communication is possible in two cases:

(a) If a prisoner in remand detention is strongly suspected of having committed a crime defined under sections 129a or 129b of the Criminal Code (StGB) (forming a criminal organization within Germany or abroad), then section 119 (4), first sentence, in conjunction with section 148 (2) of the Code of Criminal Procedure (StPO) provides that the acceptance of letters and other items is to be refused if the sender does not agree to have these inspected in advance by a judge not involved in the subject matter of the investigations (pursuant to section 148a of the Code of Criminal Procedure (StPO)). This restriction is intended to prevent the accused from continuing his activities on behalf of the terrorist organization from his place of detention. A court will issue the corresponding order, in which context the principle of proportionality must be observed. The order may be kept in force for as long as a strong suspicion exists against the accused. The accused or his defence counsel may file a complaint against the order of the committing magistrate pursuant to section 304 of the Code of Criminal Procedure (StPO);

(b) To counteract the risk of flight, tampering with evidence, or recidivism, the accused may be subjected to certain restrictions pursuant to section 119 (1) of the Code of Criminal Procedure (StPO), e.g. by having his prison visits or correspondence monitored. However, such restrictions may be ordered only if there are specific indications in the case at issue that the purpose of detention would otherwise be jeopardized and as long as the order is reasonable. The order may be upheld for as long as the grounds for issuing it prevail. The accused or his defence counsel may file a complaint against the order of the committing court pursuant to section 304 of the Code of Criminal Procedure (StPO).

33. The potential restrictions described above of the accused's communications with the consular post of his home country are in line with art. 36, paragraphs (1) and (2), of the Vienna Convention on Diplomatic Relations: the statutory provisions of section 114b (2), sentence 3, of the Code of Criminal Procedure (StPO) ensure that any accused who has

been arrested may always demand that the consular post of his home country be informed of this fact (article 36, paragraph (1), of the Convention on Diplomatic Relations). The said restrictions of communications correspond to the requirement set out in art. 36, paragraph (2), of the Convention on Diplomatic Relations, according to which the rights set out in paragraph (1) "shall be exercised in conformity with the laws and regulations of the receiving State."

Paragraph 9

34. In Germany, no military jurisdiction exists. All criminal investigations are performed by the civilian courts, also in those cases in which members of the armed forces (Bundeswehr) are suspected of a crime. Accordingly, there are no special rules under the laws governing criminal procedure for investigation and prosecution by military authorities.

Paragraph 10

35. The rules and procedures described in paragraph 81 of the State party report apply to civilian employees.

36. The criteria used to temporarily suspend a federal official are set out in section 38 of the Federal Disciplinary Act (BDG). According to the provisions of this Act, an authority responsible for filing suit under the Disciplinary Act may temporarily suspend an official at the same time as the disciplinary proceedings are initiated, or thereafter, if either of the following two prerequisites is met:

(a) It is likely that the court ruling on the disciplinary proceedings will stipulate that the official is to be removed from his post, or will stipulate the revocation of his entitlement to a pension; or

(b) The official's remaining in the service would significantly impair the administration of the service or the investigation and his temporary suspension is not unreasonable when seen against the importance of the matter and the disciplinary measure that can be expected to be handed down.

37. Since these prerequisites for a temporary suspension pursuant to section 38 of the Federal Disciplinary Act (BDG) are met in the case in which a public official is suspected of having committed a crime of enforced disappearance, the public official concerned would be suspended from his functions.

38. The disciplinary acts of the federal Länder likewise include provisions on the temporary suspension of officials.

39. In the case of military employees, section 125 of the Military Code of Discipline (WDO) provides that they may be temporarily suspended at the same time as disciplinary proceedings are initiated before a court, or thereafter; in other words in all cases in which there is the suspicion that a grave breach of duty has been committed. This prerequisite is met where there is the suspicion of an enforced disappearance having been committed.

40. There is no military jurisdiction in Germany (vide supra at paragraph 9). Accordingly, the question regarding procedural mechanisms to exclude a security force from the investigation of an allegation is moot.

Paragraph 11

41. At no point in time, and at no location, have the German authorities cooperated in the CIA air transports of detainees. Germany has always made it clear that it does not

regard the so-called renditions programmes and the secret detention of persons to be a legitimate instrument in combating international terrorism.

42. In 2006, the German parliament installed a committee of inquiry that had the task of clearing up the matter of "extraordinary rendition flights and secret prisons" (Entführungsflüge und Geheimgefängnisse). The committee established that the Federal Government, its employees and the subordinate authorities acted in keeping with the existing laws at all times. Furthermore, the investigating officer of the parliamentary committee came to the conclusion that no secret prisons operated by the CIA existed in Germany. Likewise, the joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced and Involuntary Disappearances (A/HRC/13/42), published by the Human Rights Council on 19 February 2010, determined that German public authorities were not involved, either directly or indirectly, in renditions or secret detentions by other States. This was also the result of an internal government investigation into the role of Germany and the German public authorities in connection with the efforts at combating international terrorism, which culminated in a report submitted by the Federal Government to the Parliamentary Control Committee of the German Bundestag in January 2006.

43. The investigations by the parliamentary committee of inquiry identified two instances in which CIA air transports of detainees had flown across German territory, of which the Federal Government had become apprised only after the fact. These were the following two cases:

(a) In December of 2001, a transport flight that the CIA apparently implemented in cooperation with the Swedish authorities took place, with two Egyptians being transported from Sweden to Egypt. For approximately three quarters of an hour, the flight traversed German territory without, however, landing in Germany. The Federal Government became aware of this flight only in 2007 as a result of the investigations performed by the investigating officer of the parliamentary committee;

(b) The prisoner transported in the second flight was the Egyptian Abu Omar, who, according to the results of an investigation performed by the public prosecutor's office of Milan had been taken to Egypt via the United States army base in Ramstein, Germany. The investigating officer of the parliamentary committee has confirmed that the Federal Government became aware of this fact only in 2005 through reports in the Italian media.

44. The German institutions involved were diligent in performing the investigations of potential transports of prisoners over German territory. Once the information on the transport of Abu Omar over German territory had been corroborated, the public prosecutor's office of Zweibrücken, which is locally responsible for Ramstein, immediately launched an investigation under criminal law on 19 July 2005. However, the investigation proceedings for unlawful deprivation of liberty and other crimes had to be terminated on 21 January 2008, pursuant to section 170 (2) of the Code of Criminal Procedure (StPO) since no perpetrator had been identified. It had not been possible to establish which of the CIA operatives facing charges in Italy had been involved in the flight to Ramstein. The United States authorities, on their part, were not willing to provide the corresponding information and to contribute to clearing up the facts of the matter. Requests for judicial assistance that the public prosecutor's office of Milan filed with the United States authorities did not meet with success.

45. As regards the flight over German territory in December of 2001, the federal public prosecutor's office (Bundesanwaltschaft) launched criminal investigations on 13 June 2008 against persons unknown for the suspicion of unlawful deportation. These investigations were terminated on 18 May 2012. The investigations, and particularly the replies made by

Sweden to the request for judicial assistance filed by Germany, did not provide sufficient grounds for further investigations or the preferment of an indictment, mainly because no specific suspects were named.

Paragraph 12

46. Sections 59 et seqq. of the Act on International Cooperation in Criminal Matters (Gesetz über die Internationale Rechtshilfe in Strafsachen, IRG) provide for legal assistance on a non-treaty basis. According to these provisions, other legal assistance can be provided in a criminal matter at the request of a competent authority of a foreign State. As a general rule, the only prerequisite therefore is that the matter concerned fulfils the conditions in which German courts and executive authorities could render mutual legal assistance to each other.

47. Accordingly, comprehensive judicial assistance can be provided to all States of the world, independently of any multilateral or bilateral agreement. This includes any and all types of investigative measures that the German Code of Criminal Procedure has foreseen for purely national proceedings.

48. The provision of legal assistance to other States parties in case-specific criminal contexts is governed by sections 59 et seq., 73 of the Act on International Cooperation in Criminal Matters (IRG). This other judicial assistance cannot be provided, particularly in those cases in which restrictions imposed by the laws governing fundamental rights or international law apply. They include, for example, the threat that a person affected may be subject to the death penalty, the danger of political persecution, or the threat of any other treatment in violation of human rights, such as torture. Furthermore, individual measures are tied to specific requirements under national law, such as the decision by a judge or a certain severity of suspicion.

49. Generally, there are numerous limitations in Germany that may prevent the provision of judicial assistance. In this context, the same rules apply for cases of legal assistance in connection with enforced disappearances, as they do for all other cases of judicial assistance. The concrete application of the restrictive legal standards will always be based on an assessment of the individual case concerned.

50. Restrictive legal standards have been set out particularly in the bilateral and multilateral treaties (such as the United Nations Treaty against Transnational Organized Crime, other United Nations Conventions, the European Convention on Human Rights) that the Federal Republic of Germany has concluded. Pursuant to section 73 of the Act on International Cooperation in Criminal Matters (IRG), the provision of judicial assistance is impermissible in Germany, as a matter of principle, if this were to contradict fundamental principles of the German legal order (vide supra). For example, section 6 of the Act on International Cooperation in Criminal Matters (IRG) stipulates with regard to the extradition provided for by sections 3 et seqq. of said law that extradition generally shall not be admissible if there is serious cause to believe that, if extradited, the person sought would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his situation would be made more difficult for one of these reasons. Moreover, extradition pursuant to section 11 of the Act on International Cooperation in Criminal Matters (IRG) will be admissible only if it is warranted, inter alia, that the person sought will not be transferred to a third State without Germany's consent and that said person may leave the requesting State after the final conclusion of the proceedings for which extradition had been granted.

51. The Act on International Cooperation in Criminal Matters (IRG) furthermore stipulates a series of specific limitations governing judicial assistance that depend, in the individual case, on the instrument of judicial assistance that has been selected in the specific case.

52. Conditions may be applied where it is possible to refuse to provide legal assistance otherwise. Such conditions may refer to various circumstances, for example the evaluation of information and evidence, the protection of personal data, the exclusion of certain punishments, or the warranty that the procedural guarantees in place under the rule of law will be applied.

Paragraph 13

53. Article 16 of the Convention stipulates that extraditing a person is prohibited (prohibition of refoulement) in those cases in which there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance in the State concerned. The Federal Government is of the opinion that the circumstances characteristic of an enforced disappearance are covered by section 60 subsections (1), (2) and (7) of the Residence Act (Aufenthaltsgesetz, AufenthG), particularly insofar as subsection (7) stipulates that a person may not be extradited by way of refoulement if he or she is subject to a significant and concrete danger as concerns his or her life, limb, or liberty.

Paragraph 14

54. In extradition procedures (vide supra at paragraph 12), the Higher Regional Court (Oberlandesgericht, OLG) will review whether the extradition is to be refused because of the danger that the person concerned will be subject to treatment in violation of human rights in the requesting State. Based on the statements made by the person alleging persecution as to the facts and circumstances, the court will regularly obtain a report from the German embassy in the requesting State, which will, in individual cases, contact other diplomatic missions. Additionally, the reports filed by national and international organizations will be relied upon, such as the situation reports filed by the German Foreign Office (Auswärtiges Amt), the report of the European Committee for the Prevention of Torture, or the United Nations Committee against Torture. Additionally, reports prepared by non-governmental organizations may also be reviewed.

55. German law provides for the procedure for terminating a person's sojourn in Germany (return/deportation) in sections 50 et seqq. of the Residence Act (AufenthG). Regulations for enforcing the obligation to leave the country have been set out in sections 57 et seqq. of the Residence Act (AufenthG). In every case in which such a sojourn is terminated, the authorities will review ex officio whether any prohibitions of deportation are in place regarding the State to which the person concerned is to be transferred pursuant to section 60 of the Residence Act (AufenthG) (cf. also paragraph 13). The review of such factors preventing deportation comprises the protection of the liberty of the person concerned in the State to which he or she is to be transferred and thus also the protection of that person against any enforced disappearance, cf. section 60 (7) of the Residence Act (AufenthG). Accordingly, a prohibition of deportation is assumed when there is the concrete danger that the person concerned may be subjected to enforced disappearance. In the context of reviewing whether prohibitions of deportation are in place regarding the State to which the person concerned is to be transferred, it must also be investigated whether the option is available of obtaining diplomatic assurances from said State, and whether these are suited to ruling out any danger (cf. Clause 60.0.4.8 of the General Administrative Rule (Allgemeine Verwaltungsvorschrift) on the Residence Act (AufenthG), Official Record of the Federal Council (BR-Drs.) 669/09). For further details, please see the replies below.

56. Inasmuch as there are grounds to assume that the person concerned will be returned to a further State by the State to which he or she has been transferred by way of terminating the sojourn in Germany, this is to be taken into account by the German authorities reviewing the factors preventing deportation (cf. Clause 60.0.4.1 of the General

Administrative Rule on the Residence Act (AufenthG), Official Record of the Federal Council 669/09). In this way, the problem of a threatening "chain of deportations" and the danger existing in this context that the person concerned may be subjected to enforced disappearance can be countered.

57. No classification of certain States as "safe" has been determined in connection with extradition proceedings; every single case is subject to individual review.

58. In the context of the Asylum Procedure Act (Asylverfahrensgesetz, AsylVfG), safe third countries are deemed to be the member States of the European Union as well as Switzerland and Norway (section 26a (2)). A State may be classified as a safe third party country if it is assured that the Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights apply in this State (Article 16a, paragraph (2), first sentence of the Basic Law (GG)).

59. In general, Germany is prepared to accept diplomatic assurances serving to rule out the assumption that factors preventing deportation exist that are specific to the State to which the person concerned is to be transferred (vide supra). The European Court of Human Rights has recently provided a comprehensive and detailed overview of the prerequisites under which reliance could lawfully be placed on such assurances in its judgment *Othman (Abu Qatada) v. United Kingdom* (Application 8139/09 of 17 January 2012). In assessing assurances made, the entirety of all relevant factors is to be taken into account, such as those listed below by way of providing examples:

- Whether the terms of the assurance have been disclosed to the Court
- Whether the assurances are specific or are general and vague
- Who has given the assurances and whether that person can bind the receiving State, etc.

The principles established by the European Court of Human Rights are applied in the Federal Republic of Germany.

Paragraph 15

60. Pursuant to sections 117 and 118b of the Code of Criminal Procedure (StPO) in conjunction with section 297 of said Code, either the accused party or counsel for the defence may file a petition for review of the detention. If remand detention is being enforced against the accused party, or if the accused party has been temporarily placed in a psychiatric hospital or other institution, then section 140 (1) number 4 of the Code of Criminal Procedure (StPO) stipulates that at all times, defence counsel is to be assigned to that person at the cost of the State, who will then be able to act on his or her behalf. Where the accused is a minor, the persons legally responsible for the child's education and the legal representatives may also file petitions and seek legal remedies. Besides these parties, no other persons are authorized to seek legal remedies on behalf of the accused party. However, if there is the suspicion that the arrest by government authorities corresponds to an unlawful deprivation of liberty (section 239 et seqq. of the Criminal Code (StGB)), then anyone can make this the subject of an information regarding a criminal offence (section 158 of the Code of Criminal Procedure (StPO)), whereupon the facts and circumstances of the matter will be reviewed in proceedings under the rule of law.

Paragraph 16

61. In Germany, people may be deprived of their liberty in the following institutions, respectively under the following circumstances:

- Psychiatric institutions (the persons concerned being placed in accordance with public law, the laws governing the care for such persons, or criminal law)
- Holding centres for immigration detainees
- Police detention
- Penal institutions.

62. The 16 German federal Länder are responsible for executing the measures of depriving persons of their liberty; the legal basis for this task differs from one Land to the next. Accordingly, it is not possible to list the entirety of all information for all places of deprivation of liberty recorded in the respective files. However, the summary below will show that the stipulations of article 17, paragraph 3, of the Convention are being complied with in Germany without exception.

63. A general obligation to maintain documentation in Germany can be inferred from the Basic Law (GG.: The entirety of the places of deprivation of liberty are either penal institutions of the State or institutions – as is the case for a number of private psychiatric institutions – that have been granted the authority under public law to execute orders by way of an administrative act conferring tasks reserved for the authorities onto a party (Beleihungsakt). As the power executing orders, the institutions are bound by law and justice. It must be possible to review the fulfilment of the obligations this entails, which means that the actions taken by the institutions concerned must be sufficiently documented. At the level of ordinary legislation, the ordinances on the keeping of files of the various federal Länder (which are identically worded in this regard) stipulate that "a list is to be kept with every court and every public prosecutor's office [...] of the persons against whom a measure depriving them of their liberty is being executed (List 53a)."

64. The details of the general documentation obligation established in this way have been provided for in the various federal Länder and the different places of deprivation of liberty in different ways. In psychiatric institutions the information listed in article 17, paragraph. 3, of the Convention as a general rule will be recorded in the patients' files, which in some instances may additionally be electronically managed. Where police detention is concerned, these data are recorded in so-called "proofs of detention," "detention books," or "lists of detainees" (the designation of these files will vary from one federal Land to the next). Above and beyond the data set out in Article 17, (3, a range of detailed data is recorded regarding the personal information of the person concerned, contact persons, the persons informed and visitors, again depending on the respective federal Land. In some instances, a computer-based information system is in place that extends across the individual detention files, so that it is possible to follow the course taken by the persons concerned through the institutions. In penal institutions (the rules of which also apply to the holding centres for immigration detainees in many federal Länder), a minimum of two types of files are maintained, these being the files containing the personal data of the detainees as well as the health files. They will (at a minimum) set out the data required by article 17, paragraph 3, of the Convention. Furthermore, many federal Länder keep commitment records and release records and/or occupancy logs, based on which the number of detainees in their facilities can be established at any given time. In many federal Länder, these files are maintained (additionally) as digital records, or digital databases exist from which key data can be retrieved on prisoners.

Paragraph 17

65. The Federal Government is aware of the criticism regarding the financial situation of the NAPT. The Conference of Länder Ministers of Justice has already voted for a doubling of the number of members of the Länder Commission. The provision of corresponding additional financial means this is currently under negotiation with other ministries. The Federal Government supports these endeavours.

66. Both the organizational act setting up the Federal Agency for the Prevention of Torture and the Länder Treaty setting up the Länder Commission refer to article 19 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They explicitly state that the members of the national mechanisms have the rights set out in article 19.

Paragraph 18

67. As set out in the State party report (paragraph 7 f.) and at paragraph 2 above, any deprivation of liberty in Germany must (comply with the law and must) be based on a judicial decision (article 104, paragraph (2), of the Basic Law (GG)). Article 104, paragraph (4), of the Basic Law (GG) stipulates that "[a] relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty." In light of the experience in Germany with totalitarian regimes, this provision pursues the purpose of ensuring comprehensive transparency regarding the whereabouts of persons in the State detention system and to thus prevent instances of enforced disappearance.

68. Against the backdrop of this general situation in terms of the law, the entirety of all institutions set out in paragraph 16 will provide persons with legitimate interest with information about the whereabouts of the person concerned (or, depending on the circumstances, also with additional information). This principle applies to all places of deprivation of liberty in all federal Länder, independently of the individual provisions. The following rules can be summarized in abstract form as applying to the different types of institutions. In psychiatric institutions, the rules of data protection and the professional secrecy obligations of physicians are of particular relevance, as the interests of the persons placed there require protection. Should the persons concerned have granted their consent, and/or inasmuch as their interests are not affected, the information being sought will be provided. Where a person is kept in police detention, the police station responsible will provide the information to persons having a legitimate interest, unless the interests meriting protection of the persons concerned prevent this from being done. The same applies to the authorities responsible for executing prison sentences and for holding immigration detainees.

69. Depending on the institution and the federal Land concerned, the petitions for information are to be filed orally or in writing. Where the person requesting such information is able to prove legitimate interest, no further conditions or restrictions will apply concerning the provision of such information. However, statutory deletion periods are to be observed in connection with the maintenance of old files (this will be 5 years, as a general rule, and 30 years at most, following the termination of the deprivation of liberty).

Paragraph 19

70. Where the actions set out in article 22 lit. a) of the Convention are taken by a judge, a different official or an arbitration judge, then this may be deemed a perversion of justice – even in those cases in which the deprivation of liberty is lawful – which is punishable under law pursuant to section 339 of the Criminal Code (StGB) by a prison sentence of between one to five years.

71. In cases in which the deprivation of liberty is unlawful, the actions set out in article 22 of the Convention may also entail liability to punishment for being an accessory to the crime of unlawful imprisonment (section 239 of the Criminal Code (StGB)), or for aiding and abetting this crime, such liability applying to any other offences committed against the person concerned in the course of enforcing the disappearance of said person (cf. the regulations cited in the German report on article 4 in paragraph 23). Additionally, the

constituent elements of the following crimes may have been fulfilled, particularly in the following cases: securing the benefits of an offence for someone after it has been committed (section 257 of the Criminal Code (StGB)), assistance in avoiding punishment or prosecution (section 258 of the Criminal Code (StGB)), assistance given in official capacity (section 258a of the Criminal Code (StGB)), prosecution of innocent persons (section 344 of the Criminal Code (StGB)), or enforcing penal sanctions against innocent persons (section 345 of the Criminal Code (StGB)). Securing the benefits of an offence (section 257 of the Criminal Code (StGB)) and assistance in avoiding punishment or prosecution (section 258 of the Criminal Code (StGB)) are liable to punishment by a prison sentence of up to five years or a monetary penalty, assistance given in an official capacity is liable to punishment under law by a prison sentence of between six months and five years. The prosecution of innocent persons by an official charged with assisting in criminal proceedings is liable to punishment under law pursuant to section 344 (1) of the Criminal Code (StGB) by a prison sentence of between 1 and 10 years, where the proceedings concern the order of a measure depriving the person concerned of his or her liberty, while the execution of a prison sentence against an innocent person is liable to the same degree of punishment pursuant to section 345 (1) of the Criminal Code (StGB).

72. Above and beyond this, disciplinary measures may be taken in the event of the actions listed in article 22 of the Convention in the context of disciplinary proceedings pursuant to the Federal Disciplinary Act (BDG) or the Military Code of Discipline (WDO); these may go as far as removing that person from his or her function as a public official (section 5 of the Federal Disciplinary Act (BDG), section 58 of the Military Code of Discipline (WDO)).

Paragraph 20

73. Pursuant to Article 20, paragraph (3), of the Basic Law (GG), the executive and the judiciary shall be bound by law and justice. Public officials in Germany are formally obligated, by swearing an oath of office, to comply with the Basic Law (GG) and all laws applicable in Germany – and thus, then, to safeguard civil liberties and to comply with the standards governing the authority to restrict the liberty of persons.

74. Where the individual professions are concerned, the following can be listed as concerns their training on human rights, in summary:

(a) In light of the particular relevance that the fundamental civil liberties have for the work they do, the professional group of policemen and women is given particularly intensive training in this field, since they execute the State monopoly on the use of force. In training them on measures of interference and teaching them to assess their impact, a considerable focus is placed on the proviso that their actions must respect the fundamental rights and comply with the law, along with the principle of proportionality, the need to base measures serving to deprive any person of their liberty on a judicial decision and the formal requirements applying to detentions and deprivations of liberty (Federal Police: 205 hours of instruction on theoretical and 100 hours of instruction on practical aspects). The substance of the matters taught in the classroom and as part of the training in the subjects of the laws governing interferences with fundamental rights, public and constitutional law, as well as the police training are geared to ensuring that the persons undergoing training as police officers will take exclusively lawful measures, from the outset of their careers; this applies to all of the courses during the entire training period (intermediate police service, 2.5 years; higher intermediate police service, 3 years; higher police service, 2 years);

(b) Above and beyond this, the entirety of all seminars for ongoing professional training in the field of the laws governing police deployments will comprehensively address the topics of measures depriving persons of their liberty or restricting them in their liberty and the stipulations of the rule of law in this regard, the legal situation (particularly the need

to base such measures on a judicial decision, the obligation to inform and instruct the persons concerned), and the practical implementation of the measures will be discussed;

(c) The current programme offered by the Federal Police Academy (Bundespolizeiakademie) for ongoing professional training courses (September 2013 through August 2014) lists 75 relevant courses with a (potential) attendance totalling 1,288 participants. In the past year (September 2012 through August 2013), 86 courses relevant to the matters listed above were offered, which were attended by 1,592 participants.

75. German public prosecutors and judges undergo ongoing professional training, inter alia, at the German Judicial Academy (Deutsche Richterakademie, DRA), a supraregional institution funded by the Federal Government and the Länder. Course participants are to be imparted knowledge and experience about political, societal, economic and various scientific developments. In the context of its course programme, the DRA regularly offers seminars on the European and international protection of human rights, in which United Nations conventions may be integrated as focal topics. Likewise, the Academy of European Law in Trier offers conferences geared towards public prosecutors and judges at which those conventions are addressed.

76. Correctional officers, who deal with and treat detainees on a daily basis, must have up-to-date knowledge in a large number of fields. The employees of penal institutions are offered special courses for their ongoing professional development in all of the federal Länder. The objective pursued by these training courses is to ensure that high professional standards are met in the institutions caring for and treating detainees and prisoners, while ensuring a safe environment. For this purpose, the employees of penal institutions are trained in human rights and the basic rights, which take concrete form in the laws governing the execution of sentences; in particular, the employees are given instruction on how to safeguard the rights of inmates in complex situations. Thus, the courses include training on how to deal with violence and on de-escalation strategies as a standard offering.

77. Likewise, the employees of psychiatric institutions pursue continual ongoing professional training ensuring the adequate treatment of the particularly vulnerable inmates. Staff members of these institutions are not only taught the necessary fundamentals concerning the rights of liberty and personal rights of the patients; their training also includes special skills in dealing with mentally ill patients. Thus, for example, the (Model) Specialty Training Regulations (Musterweiterbildungsordnung) established by the German Medical Association (Bundesärztekammer) stipulate that any ongoing professional training for specialist physicians must include, as an integral component, the "acquisition of knowledge, experience, and skills in applying the provisions of the law in placing the mentally ill, caring for them and treating them." In many federal Länder, courses are offered on topics such as managing discussions, establishing rapport and de-escalations for all employees concerned.

78. While the various institutions of the federal Länder do not provide for special courses to be given on the Convention, the premises of the rule of law on which the Convention is based form part of the general training available.

Paragraph 21

79. The declaration Germany made as regards article 24, paragraph (4), of the Convention is solely an interpretative declaration – certainly not a reservation – concerning the provision that every contracting State is to ensure that its legal order grants to the victims of enforced disappearances the right to indemnification and to prompt, fair, and reasonable compensation for their damages. By its declaration, Germany intended to clarify that allowing recourse to be taken to the courts must not lead to complaints being filed with the German courts directed against the actions taken by other States in exercise of their sovereign powers (*acta iure imperii*). As the International Court of Justice has ruled in the

proceedings Germany *v.* Italy for Jurisdictional Immunities of a State, in its judgment of 3 February 2012, according to customary international law, a State is not deprived of its immunity in cases in which it is accused of serious violations of international human rights or international humanitarian law.

Paragraph 22

80. Given the lack of practical cases and the resulting absence of a need to take any legislative initiatives, there are no legal bases in Germany that would grant victims of enforced disappearances any claims to specific forms of reparation.

Paragraph 23

81. The conduct described in article 25, paragraph 1 (a), of the Convention would be punishable under law in Germany pursuant to section 235 of the Criminal Code (StGB) (abduction of minors from the care of their parents). According to this provision of the law, anyone shall be liable to punishment who removes from the custody of one or both of his parents or his guardian, or denies them access to, a person under eighteen years of age by force, threat of serious harm or deception, or a child, without being a relative. Since there are no concrete cases in which it might be applied and thus, there is no corresponding need to take any legislative initiatives, this provision is not expressly aligned with the circumstances outlined in article 25, paragraph 1 (a), of the Convention, but it does comprise the unlawful acts listed therein. This also applies to the acts set out in article 25, paragraph 1 (b), under which they are liable to punishment as follows: forgery of documents (section 267 of the Criminal Code (StGB)), causing wrong entries to be made in public records (section 271 of the Criminal Code (StGB)), tampering with official identity documents (section 273 of the Criminal Code (StGB)), suppression of documents (section 274 of the Criminal Code (StGB)) and falsification of personal status (section 169 of the Criminal Code (StGB)).

Paragraph 24

82. The German laws governing adoption permit the adoption of children to be annulled in cases in which the rights of the child or of its parents to be involved in the adoption proceedings were not respected. Even if the case of enforced disappearance is not expressly mentioned, these types of scenarios are covered by the law (although they are only hypothetically conceivable for adoptions entered into in the territory of the Federal Republic of Germany).

83. For a child to be adopted, its consent is required pursuant to section 1746 of the Civil Code (Bürgerliches Gesetzbuch, BGB). Pursuant to section 1747 of the Civil Code (BGB) the consent of the parents is likewise required for the adoption of the child, which may be substituted only subject to very strict prerequisites if this serves the best interests of the child (cf. section 1748 of the Civil Code (BGB)). Where the adoption has been agreed without the required consent of the child or of the child's parents, the adoption may be annulled pursuant to section 1760 of the Civil Code (BGB) upon a corresponding petition having been filed with the family court. The provision of the law is applicable also in those instances in which the consent granted was invalid for one of the reasons set out in section 1760 (2) of the Civil Code (BGB), for example because the party making the declaration was unlawfully induced to make it by duress. Pursuant to section 1762 of the Civil Code (BGB), that person is entitled to file the corresponding petition without whose application or consent the child was adopted.

84. The right to file an application for cancellation is limited to three years following the date of the adoption (section 1762 (2), first sentence, of the Civil Code (BGB)), since the ties that the child will have developed in the meantime to the new family are to be maintained in the best interests of the child. However, the family court may also annul the adoption, ex officio, after the period has expired for as long as the child is a minor, if serious reasons so require for the best interests of the child (section 1763 of the Civil Code (BGB).

Paragraph 25

85. In the entirety of all legal proceedings concerning children, their best interests are the focus. Thus, section 1741 (1), first sentence, of the Civil Code (BGB) expressly stipulates, as concerns the adoption of a child, that this shall be permissible only if it serves the child's best interests. The central concept of ensuring the best interests of the child is also clearly illustrated by the provision governing the annulment of adoptions discussed above (section 1763 of the Civil Code (BGB)).

86. With regard to the custody of a child and the right of access to the child, section 1697a of the Civil Code (BGB), which bears the heading "Principle of best interests of child," stipulates that the court is to take that decision, unless anything else has been determined, that is most conducive to the best interests of the child.

87. The German laws governing proceedings before the family courts ensure that children are able to assert their will and their interests in such proceedings and that in this way, a decision can be taken that is oriented by the best interests of the child. Both in proceedings concerning the release of a child by persons who are unlawfully preventing one or both of its parents from having access to the child, pursuant to section 151, number 3, of the Law on the Proceedings regarding Family Matters and Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen and in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG), and in proceedings that concern parental care pursuant to section 151, number 1, of said Law, the child is to be heard in person as stipulated by section 159 of said Law. According to section 159 (1), first sentence, of said Law, the family court is to hear the child in all cases in which the child is 14 years of age or older. Prior to this point in time, the child is to be heard in person in accordance with paragraph (2) of this provision if this is suited for the purpose of the proceedings.

88. Additionally, the family court is to appoint suitable counsel to assist the under-age child in proceedings concerning its person as stipulated by section 158 (1) of the Law on the Proceedings regarding Family Matters and Voluntary Jurisdiction (FamFG), inasmuch as this is required in order to safeguard the child's interests. Pursuant to section 158 (4) of said Law, the task of such counsel consists of determining the interest of the child and asserting said interest in the court proceedings, while also informing the child about the subject matter of the proceedings, their course and the potential outcome in a suitable manner.

89. When the child is heard in person by the court, the child is to be informed, pursuant to section 159 (4), first sentence, of the said Law, about the subject matter of the proceedings, their course, and potential outcome in a manner that is suitable and corresponds to its age, unless this may be detrimental to the child's development, education, or health. The child is to be given the opportunity to make a statement. Where counsel has been appointed for the child for the proceedings pursuant to section 158 of the Law, the child is to be heard in his presence. In order to ensure that the child is able to speak about its will and interests freely and without inhibitions, the child will be heard as a general rule in the absence of its parents.

90. Also outside the specific context of family law, there are a number of legal rules that are to enable children to comprehensively state what their interests are. Thus, for example,

the Courts Constitution Act (GVG) stipulates in section 171 (b) that the proceedings are to take place in camera, particularly where witnesses are under age and in order to protect personal privacy. Furthermore, section 171 (b) (1) of the Courts Constitution Act (GVG) stipulates that in camera proceedings may be held should any circumstances from the personal sphere of life of a party involved in the proceedings, a witness, or a party aggrieved by an unlawful offence be brought up, the public discussion of which would infringe interests meriting protection. In this context, the particular stress that a public main hearing may entail for children and youth is to be taken into account.